# STATE OF MICHIGAN

# COURT OF APPEALS

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HENRIETTA BRINEY,

Plaintiff-Appellee,

v

KELSEY-HAYES and VARITY CORPORATION,

Defendant-Appellants.

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UNPUBLISHED
August 21, 2001

No. 218621
Wayne Circuit Court
LC No. 96-643009-CK

Before: O'Connell, P.J. and Fitzgerald and Wilder, JJ.

Wilder, J. (*dissenting*).

While I agree with the majority that, in certain circumstances, changes in an employer's vacation policy may give rise to a breach of contract claim, *Dumas v Auto Club Ins Ass'n* 437 Mich 521, 530; 473 NW2d 652 (1991); *In re Certified Question* (*Bankey v Storer Broadcasting Co*), 432 Mich 438, 457 n 17; 443 NW2d 112 (1989); *Couch v Difco Laboratories, Inc*, 44 Mich App 44; 205 NW2d 24 (1972), I do not agree that in response to defendant's motion for summary disposition plaintiff established a genuine issue of material fact as to whether she suffered an injury as a result of defendant's change in vacation policy. Accordingly, I respectfully dissent.

Defendant sought summary disposition asserting that plaintiff failed to present any evidence establishing she or other employees were deprived of their vacation time from 1994. In response, plaintiff asserted that John Frait's deposition testimony, in which he testified that employees were concerned that they "lost" their accrued vacation and that they had not been compensated for that vacation time, created a genuine issue of material fact. However, Frait's testimony does not establish that employees *actually* lost vested vacation time. Rather, Frait admitted that under the new policy he received exactly the same of amount of vacation in 1995 that he was entitled to receive under the old policy. Frait also acknowledged that it appeared as if he "lost nothing as a result of this change in policy." There was no evidence from Frait, or anyone else prior to trial, to establish that other employees actually lost accrued vacation time without compensation.

In this regard, the memo written by defendant to all their salaried employees detailing the policy change, stated, in part that:

> Under this new arrangement, *employees will remain on their same vacation schedule based on their service with the company as of December 31*[,

> 1994.] Vacation time will be earned on a pro-rata basis during the vacation year (e.g. an employee with three weeks vacation for the entire year will earn 1.25 days vacation for each month worked during the vacation year). The vacation earned in a year must be taken the same year. Vacation carryover and pay-in-lieu of vacation not taken will not be permitted nor authorized.
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> *Special transition features will apply in 1995*. During 1995, employees who resign or are terminated by the company, will be paid for any unused vacation entitlement, that is, the total amount of vacation for a full year worked less the vacation actually taken during the year. Beginning in 1996 and beyond, employees who resign or are terminated will only be paid for any earned vacation that they have not taken. In addition, employees who resign or are terminated before the end of the vacation year, who have taken unearned vacation, will have the dollar value of the unearned used vacation deducted from their final pay check. [Emphasis added.]

This memo clearly establishes that plaintiff was entitled to use all of her accrued vacation time from 1994 in 1995 or, in the event that she ceased employment with defendant in 1995, to be paid for all of her unused vacation time. The memo further indicates that plaintiff was entitled to the same amount of vacation after the policy change as she was before the change, uncontradicted evidence that defendant did not in any way disturb plaintiff's vested right in 3.5 weeks vacation per year. Finally, and equally as important, in light of the statement that plaintiff would stay on the same vacation schedule in 1995 as in 1994, plaintiff did not establish, in opposing summary disposition, that she had a legitimate expectation of entitlement to receive double the amount of her regular vacation in the policy transition year. See e.g., Restatement of Contracts, 2d, § 2(1); *Lytle v Malady*, 458 Mich 153, 164-165; 579 NW2d 906 (1998); *Rood v General Dynamic Corp*, 444 Mich 107, 139; 507 NW2d 591 (1993); *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 615; 292 NW2d 880 (1980). Thus, because plaintiff presented no evidence to support her contention that she or other employees suffered damages as a result of the policy change, no genuine issue of material fact existed on this point, and summary disposition should have been granted in defendant's favor.[1] See *In re Certified Question, supra* at 457 n 17, 459 n 1; *Dumas, supra* at 530; *Couch, supra*.

For the reasons stated above, I would reverse the entry of judgment in favor of plaintiff and remand with instructions for the trial court to grant defendant's summary disposition motion pursuant to MCR 2.116(C)(10).

/s/ Kurtis T. Wilder

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[1] I share with the concurrence a reluctance to interfere with a jury verdict. In this case, however, plaintiff failed to present evidence sufficient to entitle her case to get to trial.